No. 73-88

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

EUGENE H. EDWARDS AND WILLIAM T. LIVESAY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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CITATIONS

508-169—75——1

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Sixth Circuit in these two cases.

OPINION BELOW

The opinion of the court of appeals in *Edwards* (App. A, pp. 1a–15a) is reported at 474 F. 2d 1206. The court of appeals did not enter an opinion in *Livesay*, but entered an order (App. B, p. 16a) reversing the judgment of conviction on the basis of its opinion in *Edwards*.

JURISDICTION

The judgment of the court of appeals in *Edwards* (App. C, p. 17a) was entered on March 8, 1973, and in *Livesay* (App. B, p. 16a) on April 11, 1973. Timely

petitions for rehearing with suggestion for rehearing *en banc* in both cases were denied on May 10, 1973 (Apps. D. and E, pp. 18a, 19a). On May 31, 1973, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to July 9, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the taking of clothing worn by a defendant, without a warrant, after he has been lawfully arrested and taken into custody for the commission of an offense, is an unreasonable search and seizure when there was probable cause to believe that the clothing contained evidence of the defendant's complicity in the offense.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Ohio, respondents were convicted of attempting to break and enter a United States Post Office, in violation of 18 U.S.C. 2115.

The facts, which are not in dispute and are recounted at length in the opinion of the court of appeals (App. A, pp. 1a-3a), are that shortly before midnight on May 21, 1970, respondents were lawfully arrested and charged with attempting to break into the Lebanon, Ohio, post office. Later that night, an investigation by local police authorities revealed that the attempt to enter the post office had been made through a window on the north side of the building. The window was inspected, and paint samples were taken the next morning from the window sill (*id.* at 3a). On that

morning, the police officers purchased new trousers for respondents, who were still dressed in the clothing which they had been wearing at the time of their arrest (*id.* at 3a). At the officers' request, respondents turned over to the officers the trousers they had been wearing and donned the new ones. Scientific examination and comparison of paint traces found on respondents' clothing with paint chips taken from the vicinity of the damaged post office window showed that both samples came from the same source (*id.* at 3a).

After an evidentiary hearing, the district court overruled respondents' motion to suppress the results of the examination of the paint chips as the fruit of the allegedly unlawful taking of their clothing. On appeal, the court of appeals reversed. It concluded that, although respondents' arrest was lawful and probable cause existed for the seizure of the clothing, the failure of the police officers to obtain a warrant rendered the search unlawful. The court held that "a search cannot be incident to an arrest after the administrative process and the mechanics of the arrest have come to a halt and the prisoner is in jail. At this point, the justifications for the 'search incident' exception no longer exist" (App. A, p. 10a). Accordingly, after concluding that there was no other justification for the warrantless seizure, the court held that the suppression motion was improperly denied.

REASONS FOR GRANTING THE WRIT

This case raises an important issue involving the application of the Warrant Clause of the Fourth Amendment to the seizure of evidence, based on prob-

able cause, from one who is lawfully in custody at the time of the seizure. The court of appeals, expressly rejecting the contrary holdings of two other circuits (App. A, p. 10a), held that where law enforcement officers do not thoroughly search and seize all personal effects immediately after an arrest, a subsequent warrantless seizure some hours after the arrest violates the Fourth Amendment. The holding of the court of appeals constitutes an unreasonable departure from the policy underlying the Warrant Clause and is based principally upon a mistaken reliance on cases in other contexts which are inapposite here.

1. As the court of appeals recognized (App. A, pp. 9a–10a), its holding that the "seizure" of the respondents' trousers while they were in custody constituted an unreasonable search and seizure conflicts with *United States* v. *Caruso*, 358 F. 2d 184, 185–186 (C.A. 2), and *United States* v. *Williams*, 416 F. 2d 4 (C.A. 5). It also conflicts with *United States* v. *DeLeo*, 422 F. 2d 487 (C.A. 1), certiorari denied, 397 U.S. 1037. In each of those cases the court held that, consistent with the Fourth Amendment, the police may search the clothing of someone in lawful custody without first obtaining a warrant. In the present case, on the other hand, the Court of Appeals for the Sixth Circuit held that the failure to obtain a warrant rendered the search illegal.

It is important for this Court to resolve the conflict because of the need to have clear rules for applying the Fourth Amendment. As Mr. Justice Frankfurter stated: "Since searches and seizures play such a frequent role in federal criminal trials, it is most important that the law on searches and seizures by

which prosecutors and trial judges are to be guided should be as clear and unconfusing as the nature of the subject matter permits." *Chapman* v. *United States*, 365 U.S. 610, 618 (concurring opinion). The validity of jailhouse searches made after a defendant has been lawfully arrested is an issue of substantial and continuing importance in criminal law enforcement, and this Court should decide the question.

2. The holding of the court of appeals extending the warrant requirement to a seizure of clothing worn by a defendant already validly incarcerated constitutes an unreasonable extension of the Warrant Clause to a situation in which few, if any, of the important values which that clause is intended to serve are implicated. The basic function of the Warrant Clause is to interpose a detached magistrate between the police and the privacy of a citizen's home. "The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. * * * And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home" (*McDonald* v. *United States*, 335 U.S. 451, 455-456; *Chimel* v. *California*, 395 U.S. 752; *Johnson* v. *United States*, 333 U.S. 10, 14).

This policy consideration is, however, not present where a citizen's right of privacy has already been lawfully restricted through his arrest, and he is in custody. The Warrant Clause was intended principally to eliminate unrestricted invasions of homes, places of business and like areas without a warrant or pursuant to general warrants. Searches which followed

the taking of a citizen into custody "involved none of the[se] abuses * * *. The only victims of such searches were those who, as probable felons, were the objects of hue and cry, hot pursuit or an arrest warrant," and it was accepted that "their persons [should] be subject to search for the fruits of their crimes, or the weapons, clothes or other objects that might identify them as felons." T. Taylor, *Two Studies in Constitutional Interpretation* (1969), p. 39.

Accordingly, it is settled that after the arrest of a defendant, law enforcement officers may undertake "a relatively extensive exploration of the person" not only for concealed weapons but for evidence which he may have in his possession. *Terry* v. *Ohio*, 392 U.S. 1, 25; *Weeks* v. *United States*, 232 U.S. 383, 392. While the cases suggest that such a warrantless search for evidence is justified immediately after arrest in order to prevent its possible destruction by the defendant before a search warrant may be obtained, this justification cannot alone support such a search, since other methods, far less intrusive than a full blown search—such as the handcuffing of a defendant after his arrest and after he has been frisked for weapons—would prevent destruction of evidence on his person pending the action of a magistrate.

The ultimate justification for such a post-arrest search of the defendant is that, since a defendant's freedom and privacy have already been lawfully restrained, the need for protection against invasion of privacy, about which the Framers of the Fourth Amendment were concerned, is not present. Under these circumstances, assuming the Fourth Amend-

ment is applicable at all to jailhouse searches of prisoners (cf. *Lanza* v. *New York*, 370 U.S. 139, 143), we submit that "the conduct involved in this case must be tested only by the Fourth Amendment's general proscription against unreasonable searches and seizures." *Terry* v. *Ohio*, *supra*, 392 U.S. at 20.

Preston v. *United States*, 376 U.S. 364, upon which the court of appeals relied for a contrary result, is inapposite here. That case involved the warrantless search of an automobile, without probable cause, some five hours after the arrest of the defendants. In holding that the search of the vehicle was unjustified, the Court wrote (376 U.S. 367):

> Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest.

This Court subsequently limited *Preston* to establishing only that a search and seizure of an automobile made at a place other than where the arrest took place, *without probable cause*, is an unreasonable search and seizure that cannot be justified as incident to lawful arrest. *Chamber* v. *Maroney*, 399 U.S. 42. See, also *Cady* v. *Dombrowski*, No. 72-586, decided June 21, 1973. Where, however, probable cause to search for evidence or contraband exists, then a search of an automobile after an arrest "made at another place, without a warrant" does *not* violate the Warrant Clause. *Chambers* v. *Maroney*, 399 U.S. 42, 46-52. As the Court observed in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 463, n. 20, "[t]he rationale of *Chambers* is that *given* a justified initial intrusion [*i.e.*, respondents'

arrest], there is little difference between a search on the open highway and a later search at the station." This "rationale" supports the propriety of the search and seizure of respondents' trousers here.[1]

Chimel v. California, 395 U.S. 752, and *Coolidge v. New Hampshire*, *supra*, upon which the court of appeals also relied, are likewise inapposite. The holdings in those cases regarding the limited scope of a search incident to arrest were made in the context of situations in which law enforcement officers attempted to justify extensive searches of a defendant's home—including areas beyond the defendant's immediate reach—as incident to his arrest. Those searches involved an area which the Fourth Amendment intended to protect from warrantless intrusions by law enforcement officers.[2] A "top-to-bottom search of a man's house" (*Chimel v. California*, *supra*, 395 U.S. 766–767, n. 12) was not considered a "minor" invasion of his privacy to be tolerated as incidental to his lawful arrest. In those cases the Court held that, barring exigent circumstances, a search of a defendant's home incident to arrest must be limited to his person and

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[1] This case does not involve an search or "intrusion into the human body" (*Schmerber v. California*, 384 U.S. 757, 770), where, barring exigent circumstances, the substantial invasion of privacy involved might require a warrant.

[2] See, e.g., *Johnson v. United States*, 333 U.S. 10, 14: "The right of officers to thrust themselves into a home is also a grave concern, * * *"; *Schmerber v. California*, 384 U.S. 757, 770: "Search warrants are ordinarily required for searches of dwellings * * *"; *McDonald v. United States*, 335 U.S. 451, 456: "* * * the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home."

the areas within his immediate reach (395 U.S. 766). As the Court of Appeals for the First Circuit stated in rejecting a claim similar to that raised here (*United States* v. ~~Deleo~~, *supra*, 422 F. 2d at 492): "We read *Chimel* as being acutely concerned about the increasing legitimation of wide-ranging warrantless searches of lodgings and buildings based on the fortuity of arrest on the premises * * *."

A search and seizure of the personal effects of a defendant after he has been lawfully incarcerated is hardly comparable to the invasion of privacy which accompanies a "top-to-bottom search of a man's house". Indeed, *Lanza* v. *New York*, 370 U.S. 139, 143, rejected out of hand the suggestion "that a public jail is the equivalent of a man's 'house' *or that it is a place where he can claim constitutional immunity from search or seizure of his person, his papers, or his effects* * * *" (emphasis added). Moreover, as we have shown, post-arrest searches have historically been held to be beyond the ambit of the Warrant Clause.

Accordingly, we submit that the court of appeals erred in concluding that the search of petitioner's clothing after his arrest and while he was lawfully in custody violated the Fourth Amendment because no warrant was obtained. Rather, the validity of the seizure should have been tested against the general proscription barring unreasonable searches and seizures.

3. The "seizure" of the defendant's trousers while he was lawfully in custody did not violate the Fourth Amendment proscription against unreasonable searches and seizures. As the court of appeals held,

there was probable cause to believe that the trousers contained evidence of respondents' complicity in the crime. The "seizure" did not subject respondents to any personal humiliation (as would the seizure of trousers immediately following arrest on a public street). On the contrary, the police officers waited until morning to purchase new pairs of trousers before they asked the respondents to remove their own. The conduct of the police officers was unexceptionable and did not involve any overreaching use of force or coercion. As the Court of Appeals for the Second Circuit observed in *United States* v. *Caruso*, 358 F. 2d 184, 185–186:

> Appellant argues on the basis of Preston v. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964), that it is the time lapse of about six hours between the moment of arrest and the final taking and holding of his clothes by the F.B.I. which violated his Fourth Amendment Federal Constitutional rights. But this case is distinguishable from *Preston* because there the question concerned the search of an automobile long after the defendants had been put in jail. Here the clothes were constantly in sight, were taken on the person of the suspect at the time of arrest and were continuously in custody. Ker v. State of California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963); United States v. Barone, 330 F.2d 543, 544 (2d Cir. 1964), cert. denied, 377 U.S. 1004, 84 S.Ct. 1940, 12 L.Ed.2d 1053 (1964).
>
> The appellant's contention means that the seizure of his clothing could have been made constitutionally only if, immediately on his arrest, he had been stripped to the buff on the

public highway. Even though that April 13th may have been a very pleasant spring day, we are of the opinion that the argument is somewhat extreme.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1973.

In the Supreme Court of the United States

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APPENDIX TO PETITION

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72-1219

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

EUGENE HOWARD EDWARDS, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Southern District of Ohio, Western Division.

Decided and Filed March 8, 1973.

Before CELEBREZZE, McCREE and LIVELY, Circuit Judges.

CELEBREZZE, Circuit Judge. Appellant appeals from his conviction in a jury trial of attempted breaking and entry of a United States Post Office in violation of 18 U.S.C. § 2115. On May 21, 1970, at about 10:50 p.m. Patrolman Ashley of the Lebanon, Ohio Police Department was on duty in his cruiser and received a radio transmission advising him that a suspicious tan Plymouth with out-of-town license plates was parked on South Sycamore Street near the Post Office Building, that three men were seen leaving the vehicle and that two persons had been seen at a meat locker at the intersection of South

Street and South Sycamore Street. Ashley examined the Plymouth, found it empty, checked the meat locker and found nothing amiss there.

Patrolman Ashley then drove northward on South Sycamore Street to Main Street, east on Main Street to the alley that runs in a north-south direction behind the Lebanon Post Office and turned south down the alley. Upon reaching the intersection of the alley and the Post Office driveway, Ashley then turned into the driveway. He went in back of the building, checked the windows there and along the side of the building.

Upon reaching the west sidewalk of Broadway, he looked to his left and observed two men, one of whom was the Appellant Edwards, on the west sidewalk of Broadway at a point approximately even with the extension of the north line of the Post Office building. At the time Ashley first observed them Edwards and his companion had their backs to him and were walking in a northerly direction on the West sidewalk of Broadway. They walked in a normal manner without looking over their shoulders or turning around to the intersection of Broadway and Main Street where they crossed Main Street to the northwest corner of the intersection and then turned west on the north sidewalk of Main Street.

When Edwards had reached and crossed the alley that intersects Main Street, Ashley received a radio transmission advising him that the burglar alarm system at the Post Office had been activated. He immediately overtook and apprehended Edwards and his companion, placed the two men in his cruiser and returned to the Post Office. Shortly thereafter Ashley took Edwards to the Lebanon Police Station where he was placed in a cell. Patrolman Ashley testified

that approximately three minutes elapsed from the time he first observed Edwards on the sidewalk to the time that he received the radio transmission advising him that the Post Office burglar alarm had been activated.

On the same evening an investigation by Ashley and several other members of the Lebanon Police Department, including Captain James Toller, who took paint samples from the window sill and the wire mesh screen, revealed that an attempt had been made to gain entrance through a window located on the north side of the building. On the following morning the Lebanon Police Department purchased new clothing for Edwards and took from him the clothing he was wearing at the time of his arrest.

Subsequent microscopic comparison of paint chips obtained from Edwards' clothing with chips from the vicinity of the damaged Post Office window made by the Ohio Bureau of Criminal Identification and Investigation revealed significant similarities. The paint samples were also examined microscopically and by means of a process known as neutron activation analysis at the Post Office laboratory in Washington, D.C., which indicated that such samples came or originated from the same source.

A motion to suppress the paint chips found in Edwards' clothing was filed and, following an evidentiary hearing, was overruled.

The alarm system at the Lebanon Post Office was triggered by sound and is silent in that nothing occurs at the Post Office to indicate that the alarm has been activated. By means of a wireless transmitter an alarm bell is sounded in the home of a nearby resident.

Two issues are raised on this appeal. First, Appellant contends that Patrolman Ashley did not have

probable cause to arrest him and that his arrest was therefore unlawful. Second, Appellant contends that the seizure and search of his clothing was unlawful because it was made after he had been in custody for ten hours. We reverse the determination of the District Court that the seizure of the clothing was lawful.

We first examine the question concerning the validity of the arrest. Whether an arrest is constitutionally valid depends upon "whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964); *Carroll* v. *United States* 267 U.S. 132 (1925).

The problem posed by this case, as it was in *Brinegar* v. *United States*, 338 U.S. 160 (1949), is determining where the line is to be drawn between mere suspicion and probable cause. The Supreme Court in *Brinegar*, *supra*, said "[t]hat line necessarily must be drawn by an act of judgment formed in the light of the particular situation and with account of all the circumstances." 338 U.S. at 176. We think that under the facts of this case, there was probable cause to arrest the Appellant. He and his companion were seen directly in front of the Post Office three minutes before the message came that the alarm had gone off. They were the only persons observed by the officer in that vicinity and it was late on a Sunday night when few people were on the street. Patrolman Ashley testified that it appeared as though the two men had just turned out of the drive leading

to the Post Office. We hold that probable cause for the arrest existed at the time Appellant was apprehended.

It next must be determined whether the removal and testing of Appellant's clothing for paint chips without a warrant was lawful.

We start with the premise that, absent some exception, a search or seizure cannot lawfully be made without the prior issuance of a warrant. The Supreme Court in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), reiterated this premise:

> Thus the most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." The exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative." "[T]he burden is on those seeking the exemption to show the need for it." In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won—by legal and constitutional means in England, and by revolution on this continent—a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and

> industrial world, the changes have made the values served by the Fourth Amendment more, not less, important. 403 U.S. at 454-5.

The two basic exceptions to the rule are those searches and seizures made incident to a lawful arrest and those made during the existence of exigent circumstances.

We begin with an examination of the "search incident" exception. It is contended by the Government that Appellant's clothing was seized incident to his arrest.

A search conducted incident to a lawful arrest must be limited to a carefully defined area, *Chimel v. California*, 395 U.S. 752, 762-3 (1969), and must be substantially contemporaneous with and confined to the immediate vicinity of the arrest, *Stoner v. California*, 376 U.S. 483, 486 (1964), *Coolidge v. New Hampshire*, *supra*, 403 U.S. at 456. In *Chimel v. California*, *supra*, the Supreme Court substantially restricted the "search incident" exception to the warrant requirement. The Court defined the proper extent of a search incident to an arrest:

> "A similar analysis underlies the 'search incident to arrest' principle, and marks its proper extent. When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might

> reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." 395 U.S. at 762-3.

The Court reviewed the test of reasonableness as approved in *United States* v. *Rabinowitz*, 339 U.S. 56 (1950), and *Harris* v. *United States*, 331 U.S. 145 (1947), and determined that a reasonableness test cannot be substituted for the Fourth Amendment:

> "Thus, although '[t]he recurring questions of the reasonableness of searches' depends upon 'the facts and circumstances—the total atmosphere of the case,' [citation omitted], those facts and circumstances must be viewed in the light of established Fourth Amendment principles." 395 U.S. at 765.

The concern of the Court in *Chimel* was that the reasonableness test had permitted searches beyond the arrested person himself and the area within his immediate control. Even under the *Chimel* rationale, however, "a search of the person of an arrestee and of the area under his immediate control could be carried out without a warrant. [The Court] did not indicate there . . . that the police must obtain a warrant if they anticipate that they will find specific

evidence during the course of the search." *Coolidge v. New Hampshire*, 403 U.S. 443, 482 (1971). In the present case the search did not extend beyond the person of the Appellant. The clothing seized and searched certainly was within his immediate control and probable cause existed to believe that paint chips would be found on the clothing. The Supreme Court has rejected the distinction between mere evidence and instrumentalities, fruits of crime or contraband found during a lawful search, as long as there is a nexus "between the item to be seized and criminal behavior. Thus in the case of 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction." *Warden v. Hayden*, 387 U.S. 294, 307 (1967). In this case, there was cause for such a belief. Appellant's clothing could, therefore, properly have been the subject of a search incident to a lawful arrest because it was within the limited area defined in *Chimel v. California*, *supra*.

The question remains, however, as to whether the seizure was substantially contemporaneous with and confined to the immediate vicinity of the arrest. The removal of Appellant's clothing did not occur until some ten hours after his arrest.[1] In *Preston v. United*

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[1] Several courts have held that laboratory testing of the clothing of a jailed person without a warrant is permissible. *Hancock v. Nelson*, 365 F.2d 249 (1st Cir. 1966); *Gollihar v. United States*, 362 F.2d 694 (8th Cir. 1966); *Whalem v. United States*, 346 F.2d 812 (D.C. Cir. en banc 1965); *Robinson v. United States*, 285 F.2d 106 (D.C. Cir. 1960), cert. denied, 364 U.S. 919; *United States v. Guido*, 251 F.2d 1 (7th Cir. 1958). In these cases the court was not presented with the constitutional problem of the time delay presented here.

States, 376 U.S. 364 (1964), the Supreme Court said:

> "Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." 376 U.S. at 367.

While *Preston* involved the search of an automobile, the same rule is applicable to the search of an individual. "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber v. California*, 384 U.S. 757, 767 (1966). Some Courts have distinguished *Preston* and rendered contrary decisions. In *United States v. Caruso*, 358 F.2d 184 (2d Cir. 1966), the Court found that the removal and search of Appellant's clothing at the police station some six hours after his arrest did not violate his Fourth Amendment rights.[1] *Also see Mil-*

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[1] The Court in *Caruso* distinguished the holding in *Preston*:

> "Appellant argues on the basis of Preston v. United States 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964), that it is the time lapse of about six hours between the moment of arrest and the final taking and holding of his clothes by the F.B.I. which violated his Fourth Amendment Federal Constitutional rights. But this case is distinguishable from *Preston* because there the question concerned the search of an automobile long after the defendants had been put in jail. Here the clothes were constantly in sight, were taken on the person of the suspect at the time of arrest and were continuously in custody. Ker v. State of California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963); United States v. Barone, 330 F.2d 543, 544 (2d Cir. 1964), cert. denied, 377 U.S. 1004, 84 S.Ct. 1940, 12 L.Ed.2d 1053 (1964).
>
> The appellant's contention means that the seizure of his clothing could have been made constitutionally only

ler v. *Eklund*, 364 F.2d 976 (9th Cir. 1966). And in *United States* v. *Williams*, 416 F.2d 4 (5th Cir. 1969), the Court upheld a seizure of clothing made several hours after the arrest for the purpose of laboratory testing, because the seizure was "an integral part of, and therefore incident to, the process of arrest." 416 F.2d at 8. *See United States* v. *Gonsales-Peres*, 426 F.2d 1283, 1287 (5th Cir. 1970). We do not agree with this approach. The exception to the warrant requirement is that the search be incident to the arrest. We do not find that a seizure of clothing made long after the events of the arrest have ended can be an integral part of the arrest. While circumstances might render it possible that

> "[a] search of an arrestee is still incident to an arrest when it is conducted shortly thereafter at the jail or place of detention rather than at the time and place of arrest," *United States* v. *Gonsales-Peres*, *supra*, 426 F.2d at 1287,

a search cannot be incident to an arrest after the administrative process and the mechanics of the arrest have come to a halt and the prisoner is in jail. At this point, the justifications for the "search incident" exception no longer exist. It is well to recall these justifications as stated in *Preston* v. *United States*, *supra*, and reiterated in *Chimel* v. *California*, *supra*:

> "The rule allowing contemporaneous searches is justified, for example, by the need to seize wea-

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if, immediately on his arrest, he had been stripped to the buff on the public highway. Even though that April 13th may have been a very pleasant spring day, we are of the opinion that the argument is somewhat extreme." 368 F.2d at 185-186.

> pons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest." 395 U.S. at 764.

The Supreme Court in *Coolidge* v. *New Hampshire*, *supra*, again recognized that the search incident exception is based on these justifications:

> "The Court [in *Chimel*] applied the basic rule that the 'search incident to arrest' is an exception to the warrant requirement and that its scope must therefore be strictly defined in terms of the justifying 'exigent circumstances.' The exigency in question arises from the dangers of harm to the arresting officer and of destruction of evidence within the reach of the arrestee." 403 U.S. at 478.

Nor can the seizure be deemed a matter of reasonable police practice pursuant to a lawful arrest. In *Coolidge* the Supreme Court rejected such a theory:

> The rule that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions," is not so frail that its continuing vitality depends on the fate of a supposed doctrine of warrantless arrest. The warrant requirement has been a valued part of our constitutional law for decades, and it has determined

> the result in scores and scores of cases in courts all over this country. It is not an inconvenience to be somehow "weighed" against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the "well-intentioned but mistakenly over-zealous executive officers" who are a part of any system of law enforcement. If it is to be a true guide to constitutional police action, rather than just a pious phrase, then "[t]he exceptions cannot be enthroned into the rule." *United States* v. *Rabinowitz, supra*, . . . (Frankfurter, J., dissenting). The confinement of the exceptions to their appropriate scope was the function of *Chimel* v. *California*, 403 U.S. at 481.

In determining whether a search or seizure falls within one of the established exceptions to the warrant requirement, the burden is on the party claiming the exception to show that the circumstances permit an exception to the rule. This is not an arbitrary requirement. The Supreme Court has continually emphasized the importance of the constitutional requirement:

> "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job

> is the detection of crime and the arrest of criminals. . . . And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." *Chimel* v. *California*, 395 U.S. at 761, quoting from *McDonald* v. *United States*, 335 U.S. 451, 455-6 (1948).

To find that the seizure of Appellant's clothing was made incident to his arrest would require us to engage in the fiction that time was frozen for a period of ten hours or until the police could obtain substitute clothing. We hold that such a fiction is not permitted under the limited scope of the search incident exception. As the Supreme Court said in *Coolidge*, quoting from *Boyd* v. *United States*, 116 U.S. 616, 635 (1886):

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against

any stealthy encroachments thereon." 403 U.S. at 454.

We determine that the seizure of Appellant's clothing was not conducted incident to his arrest.

It has been suggested that the warrantless seizure of Appellant's clothing was permitted because of the existence of some exigent circumstances. We are unable to determine, however, what those circumstances might be. The burden, of course, lies with Appellee to show the existence of exigent circumstances. "We cannot be true to [the] constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." *McDonald* v. *United States*, 335 U.S. 451, 456 (1948); *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 455.

Appellant had been in custody for ten hours when his clothing was seized. He presented no danger to the police during this period. After substitute clothing had been purchased, it was not imperative that the clothing be seized without a warrant. Any additional time that would have been needed to obtain a warrant would have been very small in comparison with the period of time Appellant had already been in the jail. Nor is it likely that any additional time would even have been required, in view of the fact that ten hours had elapsed.

> "[T]he police must, whenever practicable, obtain judicial approval of searches and seizures through the warrant procedure, . . . and . . . [t]he scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Chimel* v. *Cali-*

fornia, supra, 395 U.S. at 762; *Terry* v. *Ohio*, 392 U.S. 1, 20 (1968).

We find no exigent circumstances existed which prevented the police from obtaining the necessary warrant.

One final consideration is whether Appellant could be held to have consented to the surrender of his clothing, as was the holding in *Clarke* v. *Neil*, 427 F.2d 1322 (6th Cir. 1970). We do not find that Appellant's status as a prisoner permits the inference that he consented to the removal of his clothing.

In view of the foregoing, we find that the seizure of Appellant's clothing was not made pursuant to any exception to the rule requiring that a warrant be obtained. We remand to the District Court with instructions to grant Appellant's motion to suppress the evidence obtained by the unlawful seizure of Appellant's clothing.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72-1218

[Filed April 11, 1973, James A. Higgins, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

WILLIAM T. LIVESAY, DEFENDANT-APPELLANT

ORDER AND JUDGMENT

Before: CELEBREZZE, MILLER and KENT, Circuit Judges

This is an appeal from a conviction of attempted larceny of a Post Office in violation of 18 U.S.C. § 2115. We previously reversed the conviction of Appellant's co-defendant, Eugene Howard Edwards, on the basis that a seizure of his clothing was made without the necessary warrant having been obtained. *United States* v. *Edwards*, (No. 72-1219, March 8, 1973). The seizure of Appellant's clothing in this case rests on the same facts and we reverse for the reasons stated in the *Edwards* case.

We remand to the District Court with instructions to grant Appellant's motion to suppress the evidence obtained by the unlawful seizure of Appellant's clothing.

SO ORDERED.

ENTERED BY ORDER OF THE COURT

/s/ James A. Higgins
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 72-1219

[Filed March 8, 1973, James A. Higgins, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

EUGENE HOWARD EDWARDS, DEFENDANT-APPELLANT

BEFORE: CELEBREZZE, MCCREE and LIVELY, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the case be remanded to the District Court with instructions to grant Appellant's motion to suppress.

No costs awarded inasmuch as this appeal is In Forma Pauperis.

Entered by order of the Court.

/s/ James A. Higgins
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72-1219

[Filed May 10, 1973, James A. Higgins, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

EUGENE HOWARD EDWARDS, DEFENDANT-APPELLANT

ORDER

BEFORE: CELEBREZZE, McCREE and LAVELN, Circuit Judges.

On consideration of the Plaintiff-Appellant's petition for rehearing and suggestion for rehearing en banc, no Judge of this Court having moved for rehearing en banc, and the petition having been referred, under the Court's Rules, for disposition by the panel which heard the case, the motion for rehearing is denied.

Entered by Order Of The Court

/s/ James A. Higgins
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 75-1218

[Filed May 10, 1976, James A. Higgins, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

WILLIAM T. LIVERAY, DEFENDANT-APPELLANT

ORDER

Before: CELEBREZZE, MILLER and KENT, Circuit Judges.

On consideration of the Plaintiff-Appellant's petition for rehearing and suggestion for rehearing en banc, no Judge of this Court having moved for rehearing en banc, and the petition having been referred, under the Court's Rules, for disposition by the panel which heard the case, the motion for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ James A. Higgins
Clerk